

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

'Notice: This is an electronic bench opinion which has not been verified as official'

Date: July 24, 1997

Case No. 95 INA 335

In the Matter of:

DUALL PLASTICS, INC,
Employer

on behalf of

IVAN VICTOR GREEN,
Alien

Appearance: J. P. Curran, Esq.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Ivan Victor Green (Alien) by Duall Plastics, Inc., (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at Boston, Massachusetts, the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On January 26, 1994, the Employer, which markets custom plastic profile extrusions, filed an Application for Alien Labor Certification (ETA 750A) to permit the permanent employment of the Alien as a "Quality Control Manager/Engineer," with the following duties:

Plan, define and recommend corporate programs with the objective of installing a Total Quality Management system throughout sales, administration, maintenance and manufacturing. Implement and manage inspection and testing procedures for all products. Recommend corrective action necessary to ensure conformity with quality specifications and standards. Provide technical assistance to the purchasing department in connection with the purchase of raw materials, supplies and equipment. Assist in the development and implementation of employee participation programs. Conduct performance evaluations and compensation review for assigned staff. Estimate departmental personnel needs and interview job applicants. Supervise one Quality Technician directly and twenty-two Quality Associates.

The position was classified as a quality control manager under DOT No. 012.167-014.² The minimum qualifications for any U. S. applicants for the position were stated to be a Bachelor of Science degree in Engineering, six (6) years' experience in the related occupation of Engineering/Management and certification as a Quality Engineer.

In the Statement of Qualifications of Alien (ETA 750B), which accompanied the application, the Alien reported that he had been employed by the Employer as a Quality Control Manager/Engineer since September 1993. His prior employment was as an Engineering & Operations Manager for a period of four months in 1993 for Chicopee Industrial Contractors, Inc., and as Director of Project Management and Director of Finance, Planning & Coordination Committees for a period of twelve years for a Consulting and Project Engineering firm. The ETA 750B included a copy of a certificate that the Alien was certified as a Quality Engineer by the American Society for Quality Control on December 4, 1993.

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

Recruitment. More than twenty U.S. workers applied for the position. All of them were rejected by the Employer without an interview on the grounds that they either lacked a baccalaureate degree in the Science of Engineering, six years experience in engineering/management and/or certification as a quality engineer. The applicants included the following:

Richard J. Powers, whose resume shows that he had a Bachelor of Science degree in Electrical Engineering and had been employed for over twenty years as a Quality Control/Quality Assurance Engineer. He was rejected for lack of experience and certification.

Al Carletti, whose resume shows that he has a Bachelor of Science degree in Electronic Engineering Technology and nine years' experience in the fields of Quality Control Engineering and Quality Assurance Management. He was rejected for lack of experience and certification.

Eduardas V. Melius, Jr., whose resume shows that he has Masters degrees in Business Administration and Chemical Engineering and over seventeen years of experience in manufacturing, support services, quality, engineering and procurement. He was rejected for not having the requisite experience and certification.

Notice of Findings. The CO's Notice of Findings (NOF) proposed to deny certification on several grounds. (1) The reasons included the Employer's failure to document that its requirements for the job opportunity represent Employer's actual minimum requirements, as it had hired the Alien prior to his having been certified as Quality Engineer. (2) The CO also proposed to deny certification on the grounds that Employer had unlawfully rejected applicants, including Powers, Carletti, and Meilus, who are able and qualified for the job opportunity by education, training, experience or a combination thereof.

Rebuttal. Employer's rebuttal included a statement by its President acknowledging that the Alien was not certified as a Quality Engineer at the time he was hired, adding that he was then preparing for the requisite examination which is only given in June and September. Employer stated further that the Quality Control Manager position requires complete understanding of process design, mechanical flow and the structural workings of the extrusions as well as strong management skills. Employer then stated that the Alien had more than twenty years' experience in quality, design, computer, and structural and manufacturing engineering, and that he was well qualified for the position. The rebuttal also included a letter from Employer's counsel which challenged the qualifications of the applicants named above.

Final Determination. The CO denied certification in his January 18, 1995, Final Determination on the grounds that the Employer's rebuttal clearly showed that the Alien had not completed certification in Quality Engineering before he was hired, and that it had not established that Powers, Carletti, and Meilus were rejected for lawful, job related reasons, since they appeared qualified for the position at issue.

The Employer has requested review of the denial of its application and the Appellate File then was referred to BALCA.

DISCUSSION

(1) 20 CFR § 656.21(b)(5) provides that

The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

The Board has held that a job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary qualifications before being hired by the employer. **Super Seal Manufacturing Co.**, 88-INA-417 (Apr. 12, 1989). The Employer may not require qualifications of U. S. workers that the alien does not possess. **Western Overseas Trade and Development Corp.**, 87-INA-640 (Jan. 27, 1988).

As the Employer acknowledges that the Alien was not certified in Quality Engineering before he was hired, the Employer cannot establish such certification as an actual requirement for the position. While the Alien may have been preparing for the examination and may have met other requisites for certification prior to being hired, the Employer did not offer U. S. applicants the opportunity to prepare for or obtain certification within a reasonable period after being hired. It follows that the CO correctly denied certification for this reason alone.

20 CFR § 656.21(b)(6) also provides that, if U.S. workers have applied for the job opportunity, the employer shall document that the sole reasons for their rejection were lawful and job-related. 20 CFR § 656.24(b)(2)(ii) further provides that the Certifying officer must consider a U. S. worker able and qualified for the job opportunity, if the worker by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occu-

pation as it customarily is performed by other U. S. workers similarly employed. Moreover, the Board has held repeatedly that where a U. S. job applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the worker is qualified, even though the resume does not state expressly that he meets all the job requirements, an employer bears the burden of further investigating the U. S. applicant's credentials, including the granting of a job interview. **H. L. Walker & Assoc.**, 92-INA-328 (June 2, 1993).

We agree with the CO that the applicants Powers, Carletti and Meitus appear to be qualified for the position. Each of them has extensive experience related to the position of quality control management and engineering. Moreover, their experience appears to be in a manufacturing environment akin to the job opportunity offered by the Employer.³ Yet the Employer rejected each of them without an interview because Employer asserted that they lacked experience. As the only other reason the Employer stated for rejecting the U. S. workers was that they were not certified in Quality Engineering, it follows that the CO properly denied this application for certification, since this is not a lawful job related reason under the Act and regulations.

Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

³Contrary to the Employer's representations, the Alien's ETA 750B does not suggest that he was ever been employed by a manufacturer. Rather it appears that his prior experience was primarily in the construction field.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO. 95-INA-335

DUAL PLASTICS, INC, Employer
IVAN VICTOR GREEN, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
	:	:	:	:
Holmes	:	:	:	:
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Huddleston	:	:	:	:
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Thank you,

Judge Neusner

Date: June 2, 1997